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Murray First Thrift and Loan Co. v. Dwayne Stevenson and Carolyn Stevenson : Brief of Appellant

Utah Supreme Court

Steven Flint Lowe; Attorney for Defendants-Appellants.
Van Cott, Bagley, Cornwall and McCarthy; Robert D. Merrill; Attorneys for Plaintiff-Respondent.

IN THE SUPREME COURT
OF THE
STATE OF UTAH

MURRAY FIRST THRIFT AND LOAN COMPANY,
Plaintiff and Respondent,

vs.

DWAYNE STEVENSON and CAROLYN STEVENSON, his wife,
Defendants and Appellants.

Case No. 13820

APPELLANTS' BRIEF

Appeal from Judgment of the Third Judicial District Court, Honorable G. Hal Taylor, Judge.

STEVEN FLINT LOWE
808 East South Temple
Salt Lake City, Utah 84102
Attorney for
Defendants-Appellants

ROBERT D. MERRILL of
Van Cott, Bagley, Cornwall & McCarthy
141 East First South
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

LORRAINE PRESS 1397 SOUTH MAIN STREET SALT LAKE CITY, UTAH PHONE 487-0651

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NATURE OF THE CASE

This case arises from an action by Plaintiff-Respondent for declaratory judgment that certain recorded assignments of contract by a non-party contract buyer are valid security interests in the Defendants'-Appellants' real property.

Appellants deny any right or interest in the Respondent and Counterclaimed to clear the unlawful clouds against their title to the real property and recover the damages occasioned thereby.

DISPOSITION IN LOWER COURT

The case was decided by the Honorable G. Hal Taylor, without any material issues of fact, upon cross Motions by both parties for Summary Judgment supported by their Memorandum of Points and Authorities. The trial court granted Respondent's Motion for Summary Judgment and held, as a matter of law and equitable relief, that the recorded Assignments of Contract were enforceable against the Appellants who were thereby adjudged liable to the Respondent for the sum of $7,188.77. Defendants take exception and appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the Summary Judgment of the trial court and remand for a trial upon damages sustained by the Defendants as a result of the Plaintiff's willful and unlawful clouds on Defendants' real property.

STATEMENT OF THE FACTS

There was no conflict in the facts.

Sometime in August, 1967, Mr. and Mrs. Stevenson's employment compelled them to leave Utah and they began negotiations to sell their home to Jerry W. Cooper and Candy Cooper. The Stevensons and Coopers discussed their respective demands and requirements and eventually reached compatible terms of sale. A standard form Uniform Real Estate Contract was prpared by Mr. Stevenson and executed by the Stevensons

and Mr. and Mrs. Cooper on the 29th day of August, 1967. Paragraph 3 of the Uniform Real Estate Contract included a typewritten clause that:

> ". . . The Buyers agree that they cannot assign, sell or transfer their interest in this Contract without specific written permission of the Sellers. . . ."

The Coopers began to experience financial difficulties and Mr. and Mrs. Stevenson permitted them a number of payment extensions in an effort to be of assistance. While the Coopers were thus some $800.00 delinquent in their contract payments, they apparently contacted the Respondent Murray First Thrift and Loan Company requesting a personal loan in the sum of $6,-610.90 for a purpose unknown. The Coopers and Murray First Thrift and Loan Company decided between themselves that they would execute and accept a form "Assignment of Uniform Real Estate Contract" to secure their Agreement. Despite the clear and unequivocal restriction against assignments, neither the opportunistic Coopers nor Murray First Thrift and Loan Company ever contacted Mr. and Mrs. Stevenson.

On the 5th day of February, 1974, Murray First Thrift and Loan Company recorded its first "Assignment of Uniform Real Estate Contract" with the Office of the Salt Lake County Recorder against the Appellants' fee title. Still, there was no notice to, or written permission from, the unknowing Appellants.

It appears that in September, 1973, the Coopers and Murray First Thrift and Loan Company either reconstructed their first arrangement or negotiated a second loan for the sum of $7,188.77. Again both the Coopers and Murray First Thrift and Loan Company totally ignored Mr. and Mrs. Stevenson and on the 28th day of September, 1973, the second "Assignment of Uniform Real Estate Contract" was recorded by the Respondent against the Appellant's residence.

Jerry W. Cooper filed his Petition in Bankruptcy with the United States Bankruptcy Court on the 20th day of November, 1973 and listed both the Appellants and Respondent as creditors. At the First Meeting of Creditors held on December 11, 1973, Mr. Stevenson was informed, for the first time, of the Coopers-Murray First Thrift and Loan Company's credit arrangements and the unpermitted, recorded "Assignments" against their real property. The next day Mr. and Mrs. Stevenson formally demanded that Murray First Thrift and Loan Company remove the wrongful "Assignments" and clear the title to their property. See, Defendants' Exhibit "2". Murray First Thrift and Loan Company refused to comply with the demands and initiated this action against Mr. and Mrs. Steveson claiming a right to perfect an interest by virtue of the "Assignments".

The Appellants were never notified of the transactions affecting their fee title by either the insolvent Coopers or the Assignee-Respondent and they have never given their written permission, consent or assent to any

assignments of the August 29, 1967 Uniform Real Estate Contract.

These facts are established by the record submitted on appeal as set forth in the Memorandum of Points and Authorities filed by both parties in support of their respective Motions for Summary Judgment; and, by the trial court's Findings of Fact and Conclusions of Law; and, by the trial court's Judgment and the Statement of Proceedings.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN NOT FINDING THE EXPRESS PROHIBITION AGAINST ASSIGNMENT OF THE STEVENSON-COOPER UNIFORM REAL ESTATE CONTRACT AN ENFORCEABLE CONTRACTURAL CONDITION PRECEDENT TO AN ASSIGNMENT FROM COOPERS TO RESPONDENT WHICH WOULD BE EFFECTIVE AGAINST THE APPELLANTS.

Contracts are generally assignable to third parties unless the original obligor and obligee expressly agree to restrict assignments as part of their contractural consideration. § 70A-2-210 (2) (3) Utah Code Annotated.

Specifically, there are two types of prohibitions against assignment of contracts:

(1) *General Restrictions,* which declare the agreement nonassignable without any exception or recourse. 55 Am. Jur., *Vendor and Purchaser,* § 432, Page 842; or,

(2) *Restrictions requiring the permission of the seller before assignment,* which is the type involved in the Stevenson-Cooper Contract and is a condition precedent that the Seller's written permission must be obtained before a valid assignment by the Buyer. 55 Am. Jur., *Vendor and Purchaser,* § 435; *Lockerby* v. *Amon,* 64 Wash. 24, 116 P. 463 (1911); *Smith* v. *Martin,* 94 Or. 132, 185 P. 236 (1919); Goddard, *Non-Assignment Provisions in Land Contracts,* 31 Mich. L. Rev. 1 (1932).

An express condition precedent to assignment is for the sole benefit and protection of the obligor-seller who thereby reserves a right to contract only with the original obligee-buyer. Restatement of Contracts, 2d § 149 (2) *Assignment of Rights,* Comment (a). Concurrently, where the obligee-assignor contracts in assignment without the obligor's required written consent, the assignee can only acquire rights against the obligee-assignor. *Fox-Greenwald Sheet Metal Co.* v. *Markowitz Bros.,* 452 F. 2d 1346, 1351 (1971); *Johnston* v. *Landucci,* 21 Cal. 2d 63, 130 P. 2d 405 (1942).

In the present case the express term of agreement between the Stevensons and Coopers restricting contractual assignment without prior written permission may not invalidate the subsequent, unpermitted contracts of assignment *as between* Coopers and the Respondent. However, the overwhelming weight of authority holds

the Respondent cannot acquire any right or claims against either the Appellants or their fee title to the real property.

Professor Williston's treatise on the Law of Contracts states the rule in point as follows: "In an agreement to convey real estate it is not unusual to provide that the vendee shall not assign his right to conveyance and the provision is usually upheld; so, likewise, of a provision in a contract to sell goods that the buyer shall not assign his right." Williston on Contracts, § 422. Corbin on Contracts § 873 at 491.

The rule that restrictions of non-assignability are for the exclusive benefit of the obligor has been adopted by the United States Supreme Court in *Portuguese-American Bank* v. *Welles*, 242 U. S. 7, 37 S. Ct. 3, 61 L. Ed. 116 (1918) and the United States Court of Appeals in *Fox-Greenwald Sheet Metal Co.* v. *Markowitz Bros.*, 452 F. 2d 1346 (1971) where it was stated:

> "Judicial holdings sustain overwhelmingly the proposition that a contractual ban on assignment ordinarily serves to protect the obligor alone, and in no way imperils the transactions as between assignor and assignee . . . *The obligor, of course, may gain from a valid and unwaived nonassignability provision the prerogative to resist or even nullify the assignment . . .*" 452 F. 2d at 135. (Emphasis added.)

See also, *Johnston* v. *Landucci*, 21 Cal. 2d 63, 130 P. 2d 405, 408 (1942).

In the case of *Smith* v. *Martin*, 94 Or. 132, 185 P. 236 (1919), the Plaintiff Smith agreed to sell his real property to G. D. Eatinger by a contract containing a condition precedent to assignment that ". . . he [Eatinger] will not assign or transfer this Contract, nor deliver the possession of said premises to any person or persons whomsoever without the consent in writing of the said first party [Smith]." Eatinger took possession of the real property and promptly attempted to assign his interests to the Peninsula Security Company which, in turn, entered into a lease arrangement with the Defendant, Martin. Martin's arguments and briefs were submitted by the Peninsula Security Company which curiously alleged that it had no knowledge of the condition to assignment. The Supreme Court of Washington addressed itself to the law regarding non-assignment conditions in real property lease and/or sales contracts and held that:

> "A 'contract' may be defined to be an agreement between two or more parties competent to contract, upon a sufficient consideration, to do or not to do a particular thing which lawfully may be done or omitted. Hence the parties could provide that the contract should not be assigned without the written consent of one of them. There was nothing unlawful or contrary to public policy in such a stipulation, and under proper conditions the same may be enforced. . . ." ". . . in Behrens v. Cloudy, 50 Wash. 400, 97 Pac. 450, a lease contained covenants of the lessors to sell the land to the lessee in eight months at the latter's option, and also the covenant of the lessee not to assign any part of the

> lease. The Plaintiff had taken an assignment of the option without a written consent as required by the contract, and sued to compel specific performance. The court held that the covenant against the assignment was lawful and that the purchaser without written consent acquired no rights. In another Washington case, Bonds-Foster Lumber Co. v. Northern Pacific Railroad Co., 53 Wash. 302, 101 Pac. 877, it is laid down as a rule that —
>
> > 'One who accepts an assignment of a contract which by express terms is made nonassignable acquires only a cause of action against the assignor.' " *Smith* v. *Martin*, 185 P. at 238 (citations omitted).

The case of *Lockerby* v. *Amon*, 64 Wash. 24, 116 P. 463 (1911), follows a series of cases decided by the Supreme Court of the State of Washington and is factually identical to the case now before this Court. There, Mr. and Mrs. Amon entered into a written contract with Mr. Swingle agreeing to sell their real property for $1,600.00 with principal and interest payments to be paid within two years. The original sales contract also provided that: "It is further agreed that no assignment of this agreement shall be valid without the consent and signature of W. R. Amon and Sarah Amon . . .". Swingle assigned the contract to a Mr. Johnson who then tendered the full performance. The Amon's properly refused to recognize any right or interest in Johnson and the latter brought an action for specific performance which was pursued by Mr. Lockerby following Johnson's death. The trial court dismissed the action for specific performance and held

that the contract was non-assignable. Affirming the trial court's decision, the Washington Supreme Court stated:

> "It is not denied that stipulations of the character relied on in this case are lawful and binding upon the parties. There validity has been admitted by this court . . . (Citations omitted.)
>
> A vendor may have confidence that his vendee will not use the property to his disadvantage. It is his privilege to decline to deal with strangers. Or he may, by limiting the right of assignment, save any questions as to the interest of intervening third parties, a result not all together unlikely under our community property system. Or he may be unwilling to assume to pass upon the legal sufficiency of an assignment. The better rule is stated in *Omaha* v. *Standard Oil Company*, 5 Neb. 337, 75 N. W. 859, wherein it is said: 'It compelled the city to deal with strangers, and to determine, at its peril, which of the contesting claimants was entitled to the fund. This may have been one of the very contingencies contemplated by the city, and against which it sought to provide by making the contract nonassignable. Another object in view might have been to prevent the company from losing interest in the performance of the contract by divesting itself of all beneficial interest therein. But it is needless for us to speculate on the motives for the city's action. It is enough for us to know, whatever its reasons may have been, that it has in plain language stipulated against the assignment of the contract. That stipulation is valid and must be enforced. (Citation omitted.)

> One who accepts an assignment of a contract which by express terms is made non-assignable acquires only a cause of action against the assignor.' See also *Behrens* v. *Cloudy*, 50 Wash. 400, 97 P. 450. Whatever may have been the reasons for reserving the right to decline to deal with an assignee, such reservation contravenes no rule of public policy, and is enforceable. We attach no importance to the clauses of the contract in which the word 'assignee' is used. They will be construed in light of the whole contract, and, when so regarded, must be taken to mean such assignees as the vendor is willing to accept." 101 Pac. at 463-64.

The recent Utah case of *Blair Enterprise* v. *M-B Super Tire Market, Inc.*, 28 Utah 2d 192, 499 P. 2d 1294 (1972), involved a written Real Estate Purchase Contract whereby Blair agreed to sell M-B real property located on Main Street, Salt Lake City, Utah. The contract did *not* contain any conditions on assignment and Defendant M-B assigned its interest to Mr. Smith. The seller brought an action to declare the original contract unenforceable and the assignment of ". . . no force or effect." The District Court of Salt Lake County granted Summary Judgment to M-B Super Tire Market. On appeal this Court affirmed the trial court's decision and included the following guideline:

> "(1) *There being no restrictions in the real estate purchase contract against its assignment*, and the contract requiring the plaintiff to convey to the defendant or its assigns, the assignment was, and is, in all particulars valid, legal and enforceable as against the plaintiff." 92

C. J. S. *Vendor and Purchaser*, § 311, p. 192, and cases cited. *Blair Enterprises* v. *M-B Super Tire Market, Inc.*, 28 Utah 2d 193. (Emphasis added.)

The assignments by the Coopers to the Respondent purports to convey all of the Cooper's "right, title and interest" in the Uniform Real Estate Contract. However, all of the "right, title and interest" in the contract is subject to a valid and express condition precedent which by overwhelming authority prohibits any assignment without the Appellant's written permission. The Stevenson's permission was admittedly neither sought nor obtained by the parties to the assignment and, therefore, no "right, title or interest" in the Uniform Real Estate Contract or real property was conveyed by the Coopers to the Respondent.

POINT II.

THE TRIAL COURT ERRED IN NOT FINDING THAT THE CLAUSE RESTRICTING ASSIGNMENT OF THE STEVENSON-COOPER CONTRACT WITHOUT THE SELLER'S WRITTEN PERMISSION WAS A CONDITION PRECEDENT TO VALID ASSIGNMENT; AND, THAT THE PLAINTIFF'S COMPLAINT THEREFORE FAILS TO STATE A CAUSE OF ACTION AGAINST THE APPELLANTS.

It is established that the Stevenson-Cooper Uniform

Real Estate Contract gave the Buyer a right to acquire fee title pursuant to the terms and conditions of the agreement.

The terms of sale including the price, method of payment and interest are consideration for the contract and are rights reserved for the benefit of the Appellants. A further term of the agreement expressly restricts assignment without the Appellant's written permission and is also consideration for the contract established for the benefit of the Appellants. Finally, the terms of the agreement regarding breach and default by the Buyer are consideration for the contract reserved for the benefit of the Appellants.

It is an accepted rule of law that "in the case of a contract for the sale of land, which gives the Buyer an immediate equitable property right, the equitable right cannot be more extensive than is fixed by the Contract that created it." Williston on Contracts, § 422 at 130. The assignments and nonpayments placed the Coopers in breach of contract. The Respondent, with constructive notice of the breach by assignment, can not benefit, much less receive, an interest in a contract which it knowingly violated. Respondent's subsequent recording of the wrongful assignments constitutes an unlawful cloud which the Appellants are entitled to have removed and then proceed to recover any damages occasioned thereby.

The claims or remedies of the Respondent, if any, are limited solely to an action against the Coopers on

their Promissory Note and/or the terms of the Cooper-Murray First Thrift and Loan assignments.

Therefore, Murray First Thrift and Loan Company has no cause of action against the Appellants and, the Appellants' Counterclaim for an unlawful cloud is proper.

POINT III.

THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT EQUITABLE RELIEF WHICH IS TANTAMOUNT TO AN ORDER OF SPECIFIC PERFORMANCE OF THE COOPER-MURRAY FIRST THRIFT AND LOAN ASSIGNMENTS.

The case of *Thein* v. *Silver Investment Company*, 87 Cal. App. 2d 308, 196 P. 2d 956 (1948), presents a situation similar to the case at issue. There, the Defendant, Silver Investment Company, contracted to sell its real property to a Mr. Artz with the express condition precedent that ". . . no assignment of this contract shall be valid without the written consent of the sellers." Artz attempted to assign his interests to the Plaintiff, Thein, who ultimately brought an action against the original obligor, Silver Investment Company for specific performance of the land sales contract. Silver Investment Company, counterclaimed to quiet title and recover damages for its lost rentals.

The California Appellate Court affirmed the Superior Court's denial of Thein's action for specific perform-

ance; quieted title in the Defendant with an award of damages and, in determining that the Seller had complied with all aspects of the contract stated:

> ". . . The contentions that equity abhors forfeitures and will grant relief, where possible, from a forfeiture, need not be considered at length. *Equity does not aid one who is the sole cause of his own misfortune.* Any forfeiture that here resulted was caused by appellant's [Thein] own acts. Under such circumstances, no principal of equity suggests, far less compels, the granting of relief to appellant. *He has brought his misfortunes upon his own head.* (Emphasis added.) 190 P. 2d at 962.

In the instant situation, any loss to the Respondent results from its own willful acts in entering into an assignment of a Uniform Real Estate Contract which clearly, upon its face, prohibited assignment without the Appellants' written permission. Such a self-inflicted injury is insufficient cause to invoke the equitable powers of a Court to grant specific performance; especially, in light of the considerable damage and expense that the Respondent's conduct has visited upon the innocent Appellants who had, as consideration for the original contract, sought to protect themselves against just such injury arising from an unfortuitous assignment.

POINT IV.

THE TRIAL COURT ERRED IN FINDING THAT THE RESPONDENT HAS A "SECUR-

ITY INTEREST" IN THE APELLANTS' REAL PROPERTY.

The trial court improperly held that by virtue of the prohibited assignments, Murray First Thrift and Loan Company acquired a "security interest" in the Stevenson's real property which has both the operation and effect of making the Stevensons debtors of Murray First Thrift and Loan Company with an interest in the Stevensons' real property.

Generally, a real property "security interest" is established either by mortgage or deed of trust which must be executed by the party to be charged. § 75-1-14, Utah Code Annotated, 1953 (as amended). A valid security interest in personal property also requires that the intended debtor execute a valid "Security Agreement", and there can be no attachment or perfection of any "security interest" until there is: (a) a signed agreement, and (b) value is given to the debtor by the secured party, and (c) the debtor has rights in the collateral. §§ 70A-9-203, 204(1), Utah Code Annotated, 1953 (as amended).

In the case now before this Court there is absolutely no document executed by the Appellants or recorded either as a mortgage or deed of trust in favor of the Respondent. There is no signed Security Agreement between Appellants and Respondent. There has been absolutely no value given by Respondent to the Appellants and there is no privity of contract between the parties. Therefore, the Respondent cannot acquire a valid "secur-

ity interest", claim or right, either by statute or at common law in the Appellant's real property and the decision of the trial court must be interpreted as creating a secured debt in the Appellants' real property without any consideration being given or received.

POINT V.

SIGNIFICANT CONSIDERATIONS OF PUBLICE POLICY REQUIRE THIS COURT TO REVERSE THE DECISION OF THE TRIAL COURT AND UPHOLD THE SANCTITY AND INTEGRITY OF CONTRACTS.

It is for the good of the public that the law jealously defends the integrity of contracts and thereby insures to the people that when they find mutual assent and an exchange of valuable consideration in an arm's length transaction the lawful terms that they bargained for will be performed or, that a remedy for failure to perform the terms will be afforded by recourse to a court of law.

The decision of the trial court in this case must be reversed in order to preserve the ability to reach a meaningful contract. In the Stevenson-Cooper contract, the original parties had found mutual assent and exchanged valuable consideration in binding themselves to a reasonable and enforceable agreement. Part of the consideration which finally compelled the Appellants to enter into the contract was in the form of an express condition against assignment without their written permission. But for the Cooper's agreement to abide by the non-assigna-

bility condition the Appellants would not have entered into the contract. The effect of the trial court's decision is to deny this valuable consideration and encourage the breach of other contracts similarly negotiated.

The value of this condition precedent is further illuminated by the fact that it was demanded in order to protect the Appellants from the expenses and troubles of litigation and unlawful clouds against their title which might result from an assignment of the contract against their better interests. The wisdom on their intent is now apparent. Had the Coopers, then seriously in default of payments, sought the required permission to assign the contract as security for Respondent's Promissory Note, the permission would, reasonably enough, have been denied. The resulting cloud on the Appellants' title and expense of these proceedings would have been avoided. The trial court's decision frustrates the clear intentions of the original contracting parties and should be reversed.

The Appellants have gained absolutely nothing by the improper Cooper-Murray First Thrift and Loan Company Assignments. The decision of the trial court will encourage further insubstantial credit arrangements and has the affect of creating a $7,188.77 debt against the Appellants where there has been no consideration or privity of contract whatsoever.

The decision of the trial court, beyond interfering with the integrity of contract, may act to rescind all of the existing Uniform Real Estate Contracts in the State of Utah which contain restrictions against assign-

ability. The ruling therefore encourages, if not insures, extensive and unnecessary litigation as well as injury to other innocent parties.

CONCLUSION

By ignoring the express restriction against assignment of contract as a valid condition precedent to an enforceable assignment of the contract between the Coopers and the Respondent, the trial court committed substantial and prejudicial error as a matter of law.

The trial court further erred in ruling that the Respondent had acquired a "Security Interest" in the Appellants' real property where there is no supportive document or consideration.

The trial court further erred in granting the Respondent equitable relief which was clearly unwarranted by any review of the facts.

Finally, considerations of public policy and the sanctity of contracts require that the Judgment of the District Court be reversed and the case remanded for a trial to determine the amount of damages suffered by Appellants.

Respectfully submitted,

STEVEN FLINT LOWE
Attorney for
Defendants-Counterclaimants